

Inter Tribal Council of Arizona
Briefing Paper

**Adoption and Foster Care Analysis and Reporting System (AFCARS)
Final Rule**

Federal Register 05/12/20

<https://www.govinfo.gov/content/pkg/FR-2020-05-12/pdf/2020-09817.pdf>

On May 12, 2020, the Department of Health and Human Services (HHS); Administration on Children, Youth and Families (ACYF); Children's Bureau published the final rule to revise the Adoption and Foster Care Analysis and Reporting System (AFCARS) regulations proposed on April 19, 2019. The AFCARS regulations require Title IV-E agencies to collect and report data to ACF on children in out-of-home care, children who exit out-of-home care to adoption or legal guardianship, and children who are covered by a Title IV-E adoption or guardianship assistance agreement. This final rule is effective on July 13, 2020. The member Tribes of the Inter Tribal Council of Arizona, Inc. monitored this regulation development due to concerns that the reduction of data collection would impact needed oversight by Tribal governments with regard to their member tribal children in state custody or cases that are being transferred to the Tribes.

Background (2016-2020)

On December 14, 2016, the Administration on Children, Youth and Families (ACYF), Administration for Children and Families (ACF), Department of Health and Human Services (HHS) first published the final rule for the AFCARS regulations to increase the number of data elements to be collected by Title IV-E agencies. The published revisions included requirements to incorporate data elements related to the Indian Child Welfare Act (ICWA).

The addition of the ICWA data elements was to provide more comprehensive information to deepen the understanding of guardianships and to address the unique needs of Indian children as defined in ICWA who are in the state's placement and care responsibility and who exit to reunification, adoption or who are transferred to the custody of the Indian tribe.

In accordance with the February 24, 2017, Presidential Executive Order 13777 enforced the Regulatory Reform Agenda to lower regulatory burdens. The Order directed Federal agencies to establish a Regulatory Reform Task Force to review existing regulations and make recommendations regarding their repeal, replacement, or modification. The HHS Regulatory Reform Task Force identified the AFCARS final rule published on December 14, 2016, as one in which the reporting burden may impose costs that exceed benefits. In response to the Executive Order, an Advance Notice of Proposed Rulemaking was published in the Federal Register on March 15, 2018, soliciting specific feedback on the prior 2016 final rule data elements. Based on the feedback received and the policy direction to review the need for and utility of the data elements, a streamlined proposal for AFCARS was published in a Notice of Proposed Rulemaking on April 19, 2019.

In the April 19, 2019, Notice of Proposed Rulemaking, the number of data elements related to ICWA was significantly reduced. States are required to collect only data on:

- Inquiries made whether the child is an Indian child under ICWA,

- whether ICWA applies to the child and the date that the state title IV–E agency was notified by the Indian tribe or state or tribal court that ICWA applies,
- notification to the Indian tribe, and
- tribal membership of child, mother, father, foster parents, adoptive parents, and legal guardians.

The ICWA-related data elements from the 2016 final rule that were removed are:

- request to transfer to tribal court,
- denial of transfer,
- court findings related to involuntary and voluntary termination of parental rights, including good cause findings,
- qualified expert witness testimony,
- whether active efforts were made prior to the termination/modification,
- removals under ICWA,
- available ICWA foster care/pre-adoptive placement preferences,
- adoption/guardianship placement preferences under ICWA,
- good cause and basis for good cause under ICWA, and
- information on active efforts.

Technical Assistance Resource for States

It is noted in the May 12, 2020 Federal Register notice that the next Court Improvement Program (CIP) program instruction will emphasize collecting and tracking ICWA data. This will be coupled with technical assistance through the Children's Bureau's technical assistance provider for CIP grantees and the courts to help address this historic and ongoing information gap. In the April 19, 2019, Notice of Propose Rule Making, the information that the Court Improvement Program (CIP) grantees will be encouraged to collect and monitor will be related to:

- Identification of Indian children as defined in ICWA,
- notices to Indian tribes,
- tribal participation as parties in hearings involving Indian children,
- tribal intervention in dependency cases,
- transfer of ICWA cases to tribal courts, and
- placement of Indian children according to tribal preferences.

Per the final rule, Title IV–E agencies have two fiscal years to comply with §§ 1355.41 through 1355.47 which is to begin October 1, 2022, which is believed to be sufficient for Title IV–E agencies to implement the changes necessary to comply with this final rule. In 2016, the Arizona Department of Child Safety (DCS) initiated the development of a workgroup to build a stronger relationship between the Arizona Department of Child Services and the Tribal Child Welfare programs. Part of the workgroup's activity was to review the December 2016 final rule regarding ICWA data elements. In September 2017, the workgroup provided a report to the DCS providing additional guidance to the DCS on the inclusion of all the data elements for DCS's new database system Guardian. Follow-up will be conducted on the position of DCS with the publishing of the May 2020 AFCARS Final Rule.

Recommendations

In the May 12, 2020, Final Rule, the HHS clarifies that the agency (HHS) does not have legal authority to collect ICWA-related data or determine state compliance with ICWA; that agency is the Department of the Interior. Therefore, further clarification is needed on how additional ICWA information will be collected and how the Department of Health and Human Services and the Department of the Interior will coordinate activities.

Request Tribal consultation with the following agencies:

- Department of Health and Human Services on the collection and tracking of ICWA-related data by the Court Improvement Program grantees that will supplement the data to be collected by state Title IV-E agencies per the May 2020 final rule
- Department of the Interior on the implementing, overseeing, and assessing compliance of ICWA

Data Elements

Attached is a detailed table outlining the ICWA data elements to be collected per the May 12, 2020 Final Rule.

AFCARS Final Rule – May 12, 2020

Data to be collected by state Title IV-E agencies on Indian children involved in out-of-home care, as described in the Federal Register, includes:

(Please Note: The numbered sections outlined below tie to the sections outlined in the federal register.)

(b) Child information		
3. Reason to know a child is an "Indian Child" as defined in Indian Child Welfare Act (ICWA)	For state Title IV-E agencies only:	
	Indicate whether the state Title IV-E agency made inquiries whether the child is an Indian child as defined in ICWA	yes or no
4. Child's tribal membership	For state Title IV-E agencies only:	
	(i) Indian whether the child is a member of or eligible for membership in a federally recognized Indian tribe.	yes, no, or unknown
	(ii) If the state Title IV-E agency indicated "yes", indicate all federally recognized Indian tribe(s) that may potentially be the Indian child's tribe(s).	respond if (b)(4)(i) is "yes" submit information in a format according to ACF's specifications
5. Application of ICWA	For state Title IV-E agencies only:	
	(i) Indicate whether ICWA applies for the child.	yes, no, or unknown
	(ii) If the state Title IV-E agency indicated "yes" Indicate the date that the state Title IV-E agency was notified by the Indian tribe or state or tribal court that ICWA applies.	Notification date
6. Notification	For state Title IV-E agencies only:	
	If the state Title IV-E agency indicated "yes" to paragraph (b)(5)(i). The state Title IV-E agency must indicate whether the Indian child's tribe(s) was sent legal notice in accordance with 25 U.S.C. 1912(a).	yes or no

7. Child's race	In general, a child's race is determined by the child, the child's parent(s) or legal guardian(s). Indicate whether each race category listed in paragraphs (b)(7)(i) through (viii) of this section applies with a "yes" or "no."	yes or no
	(i) Race - American Indian or Alaska Native. An American Indian or Alaska Native child has origins in any of the original peoples of North or South American (including Central America), and maintains tribal affiliation or community attachment.	
(c) Parent or legal guardian information		
3. Tribal membership mother	For state Title IV-E agencies only; indicate whether the biological or adoptive mother is a member of an Indian Tribe.	yes, no, or unknown
4. Tribal membership father	For state Title IV-E agencies only; indicate whether the biological or adoptive father is a member of an Indian Tribe.	yes, no, or unknown
(e) Living arrangement and provider information		
10. First foster parent tribal membership	For state Title IV-E agencies only: Indicate whether the first foster parent is a member of an Indian tribe	yes, no, or unknown
11. Race of first foster parent	Indicate the race of the first foster parent for each foster family home living arrangement in which the child is placed, as indicated in paragraph (e)(3). In general, an individual's race is determined by the individual. Indicate whether each race category listed in paragraphs (e)(11)(i) through (vii) applies.	yes or no
	(i) Race - American Indian or Alaska Native. An American Indian or Alaska Native child has	

	origins in any of the original peoples of North or South American (including Central America), and maintains tribal affiliation or community attachment.	
15. Second foster parent tribal membership	For state Title IV-E agencies only: Indicate whether the second foster parent is a member of an Indian tribe	yes, no, or unknown
16. Race of second foster parent	Indicate the race of the second foster parent for each foster family home living arrangement in which the child is placed, as indicated in paragraph (e)(3). In general, an individual's race is determined by the individual. Indicate whether each race category listed in paragraphs (e)(16)(i) through (vii) applies. The Title IV–E agency must leave this paragraph (e)(16) blank if there is no second foster parent according to paragraph (e)(7) of this section.	yes or no
	(i) Race - American Indian or Alaska Native. An American Indian or Alaska Native child has origins in any of the original peoples of North or South American (including Central America), and maintains tribal affiliation or community attachment.	
(h) Exit to adoption and guardianship information Report information in this paragraph (h) only if the title IV–E agency indicated the child exited to adoption or legal guardianship in paragraph (g)(3) of this section. Otherwise the title IV–E agency must leave paragraphs (h)(1) through (15) of this section blank.		
4. First adoptive parent or guardian tribal membership	For state Title IV-E agencies only: Indicate whether the first adoptive parent or guardian is a member of an Indian tribe	yes, no, or unknown

5. Race of first adoptive parent or guardian	In general, an individual's race is determined by the individual. Indicate whether each race category listed in paragraphs (h)(5)(i) through (vii) applies.	yes or no
	(i) Race - American Indian or Alaska Native. An American Indian or Alaska Native child has origins in any of the original peoples of North or South American (including Central America), and maintains tribal affiliation or community attachment.	
9. Second adoptive parent, guardian, or other member of the couple tribal membership	For state Title IV-E agencies only: Indicate whether the second adoptive parent or guardian is a member of an Indian tribe	yes, no, or unknown
10. Race of second adoptive parent, guardian, or other member of the couple	In general, an individual's race is determined by the individual. Indicate whether each race category listed in paragraphs (h)(10)(i) through (vii) applies. The Title IV-E agency must leave this paragraph (h)(10) blank if there is no second adoptive parent, legal guardian, or other member of the couple according to paragraph (h)(1).	yes or no
	(i) Race - American Indian or Alaska Native. An American Indian or Alaska Native child has origins in any of the original peoples of North or South American (including Central America), and maintains tribal affiliation or community attachment.	

Although the following data fields are not directly related to ICWA, these data fields in the Final Rule will provide contextual information that will inform data on ICWA cases.

- Jurisdiction or country where child is living: includes tribal service area, Indian reservation
- Transfer to another agency: includes Tribal Title IV-E agency, Indian tribe or tribal agency (non-Title IV-e)

- Inter/Intra-jurisdictional adoption or guardianship: includes whether child was placed within or outside of a tribal service area within or outside the United States.

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